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No. 89.

Sup. of A. Common v. Harper, Jr.

# Supreme Court of the United States.

Appellee's.

OCTOBER TERM, 1901.

Filed Jan. 7, 1902.

UNITED STATES, Appellant,

v.

THE ST. LOUIS AND MISSISSIPPI VALLEY TRANSPORTATION COMPANY.

No. 89.

Appeal from the Court of Claims.

# BRIEF FOR THE APPELLEE.

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WASHINGTON, D. C.:
Gibson Bros., Printers and Bookbinders.
1902.

IN THE

# Supreme Court of the United States.

OCTOBER TERM, 1901.

THE UNITED STATES,
*Appellant,*

*v.*

THE ST. LOUIS AND MISSISSIPPI VALLEY TRANSPORTATION COMPANY.

*No.* 89.

## BRIEF FOR THE APPELLEE.

A most elaborate brief has been filed, on behalf of the United States. It deals with many questions which are not open for review on this appeal, and many which have no connection whatsoever with the case. The statements and arguments of counsel are interwoven with allegations of fact for which there is no foundation in the record or elsewhere. A reply could be made only by taking up the brief, sentence by sentence, or paragraph by paragraph, and pointing out the fallacies contained therein. This, we believe, would consume an unnecessary amount of the

court's time; hence we shall submit a statement of the case as it appears from the record, and consider only the material questions raised by the appellant.

## Statement of the Case.

The appeal runs from a judgment of the Court of Claims. The claim grew out of a collision between a tow belonging to the St. Louis & Mississippi Valley Transportation Company and certain United States vessels, which occurred in the port of New Orleans on May 7, 1888. The case was referred for adjudication to the Court of Claims by private act of Congress approved on August 3, 1894 (p. 5). It was provided—

> "That the legal and equitable owners or claimants of the steam towboat "*Future City*," her barges in tow, cargoes thereon, freight, and personal effects contained in them, alleged to have been sunk, lost, or greatly damaged by collision with the United States vessels of war, "*Atlanta*," "*Galena*," and "*Richmond*," in the Mississippi river, at the city of New Orleans, on or about the seventh day of May, eighteen hundred and eighty-eight, be referred to the Court of Claims, with jurisdiction and authority to hear and determine the same to judgment, with the right of appeal as in other cases: *Provided*, That no suit shall be brought under the provisions of this Act after six months from the date of the passage thereof: *And provided further*, That no judgment shall be rendered against the Government unless it shall affirmatively appear from the evidence adduced that such collision was the result of negligence on the part of the officers in command of said vessels of war." (28 *Stat. L., p.* 219.)

Suit was brought by the claimant on October 17, 1894. Evidence was adduced on behalf of both parties. Trial

was had and thereafter judgment was entered in favor of the claimant for the sum of $19,808.85 (p. 35). At the time of entering judgment, the court filed its findings of fact and conclusions of law in open court. Subsequently these findings and conclusions were amended in certain particulars, but the amendments in no way affected the judgment entered (p. 5). The findings contained in this record present the case as follows:

For many years prior to the date of the collisions the Transportation Company had been engaged in carrying grain and other merchandise between the ports of St. Louis and New Orleans, by means of towboats and tows. (*III, p.* 6.) At the time of the collisions the company owned and was using in the prosecution of its business numerous steamers and barges, including the stern-wheel towboat "*Future City*," and barges 50, 68, and 73. The vessels named were all staunch, sound, and seaworthy. The "*Future City*" had ample power to navigate the Mississippi safely, with a tow 1,000 feet in length, composed of fifteen loaded barges. (*VI, p.* 6).

On April 29, 1888, the "*Future City*" sailed from St. Louis bound for New Orleans with a tow of eight freight barges, heavily laden with grain and other merchandise, and a fuel barge which was left in the neighborhood of Greenville, Mississippi. The freight barges included "50," "68," and "73." The towboat and tow were fully and adequately manned, officered and equipped. Following a custom, well recognized and prevailing on the Mississippi, the tow was made up in the manner indicated by the diagram, which accompanies finding V (p. 6). The towboat occupied a position at the extreme rear, where, being a stern-wheel steamer, she was able to control the course and speed of her tow to the best advantage. The barges were secured

in their positions, being made fast to one another and to the "*Future City.*" The entire tow, including the towboat, was about 607 feet in length and 175 feet in width. In size and weight the tow was small when compared with those employed in the navigation of the Mississippi. (*V, p.* 6; *VIII, p.* 8.)

After leaving St. Louis the tow proceeded down the Mississippi, arriving off the upper portion of New Orleans on the morning of May seventh. In the meantime, nothing worthy of note had occurred. (*VIII, p.* 8.)

For some distance above the harbor of New Orleans the Mississippi flows in an easterly direction. About Celeste street it makes a sharp turn and flows almost due north for a distance of about three miles, the city of New Orleans being on its western and the towns of Algiers and Gretna on its eastern bank. The regular landing place for tows is on the city side of the river, something over a mile below the point formed by the bend of the river at Celeste street. For a long distance below this point there is a powerful current, which sets out from the city shore and sweeps over toward the Algiers shore. Towboats with tows, when descending the river and proceeding toward the barge landing, are obliged to hug the city shore in order to avoid being caught in the easterly current and carried out into the stream and into the track of steamboats and other unimpeded vessels. Hence the course followed by all tows from the time of entering the harbor until the landing is made, is as follows: Before reaching Celeste street the tow runs in close to the city shore where the towboat by backing throws the head or forward end of the tow outward into the stream, while she holds her stern in the slack water found near shore. In this position, being nearly broadside to the current the tow swings around the point, then with the head of the tow quarter-

ing slightly down stream it floats along the city shore, the towboat backing from time to time sufficiently to check her headway and keep her stern as close to the wharves and moored shipping as safety will permit. Just before reaching the barge landing the tow runs into slack water where, by backing hard, the towboat kills its headway, brings the tow broadside on to the shore and lands with her bow and barges down stream. (*VII, VIII, XI, pp.* 7–15.)

This method of rounding the point and proceeding to the barge landing is termed "flanking." It is well recognized by pilots and other river men as the proper and customary course for descending towboats with tows. (*VIII, p.* 8; *XV, p.* 10.)

This practice differs from the general custom of navigation, prevailing on the Mississippi among steamboats without tows. With such it is the rule for the ascending steamer to hug the starboard shore, and for the descending steamer to pass outside, toward the middle of the river. But the course of tows at New Orleans, which we have just described, has been adopted and sanctioned as a custom of navigation, because the natural conditions prevailing leave the tows no option in the matter. If they were to follow a different course, the current would carry them where they would interfere seriously with other vessels, and carry them so far toward the Algiers shore and downstream that the most powerful towboat could not bring her barges to their landing. (*XVII, p.* 12.)

When the "*Future City*," on the morning of May 7th, reached a point off Louisiana avenue, about a mile above Celeste street, she began her preparations to land, by running in toward the city shore. When near shore she backed, throwing her tow into a "flanking" position and

checked its headway until it was making only some five miles an hour, or less than the speed of the river current. In the vicinity of Jackson street the tow encountered a heavy squall of wind, accompanied by rain; but the rain ceased and the wind moderated before Celeste street was reached. Neither the wind nor rain had any effect upon the navigation of the tow or the "*Future City's*" control over the barges. (*VII, pp.* 7–8.) Between Louisiana avenue ("the elevator") and Celeste street, the tow passed the steamboat "*Mabel Comeaux*" which was ascending the river from below the point. Her pilot signaled the "*Future City*" that he would exercise his right of passing between the tow and the city shore. The "*Future City*" pushed far enough out in the river to permit the "*Comeaux*" to pass; but this had no appreciable effect upon the course of the tow and did not interfere with its "flanking" around the point at Celeste street in the customary manner. (*VIII, p.* 8.)

Before rounding the point a towboat with a tow following her customary course, and hence close in shore, cannot see vessels or other objects in the river below the point and between the middle of the river and the New Orleans shore, because buildings standing on the point and shipping moored along its banks intervene and completely shut off the view in that direction. (*IX, p.* 9.) For this, among other reasons, an anchorage ground has been adopted by all vessels, lying in the river off New Orleans, which is some distance below Celeste street and well over toward the eastern or Algiers shore. The use of this anchorage ground has come to be regarded as a usage of the port. Plenty of water and good holding ground can be found there. (*XIII, p.* 10.)

On May 5, 1888, a fleet of United States vessels, namely the "*Atlanta*," "*Galena*," "*Ossipee*," "*Yantic*,"

and "*Richmond*," came to anchor in the harbor of New Orleans. They ranged themselves in an irregular line along the western or city shore of the river, their distances from that shore varying from 500 to 700 feet. The "*Atlanta*" was anchored highest up stream, being about 150 yards below the Richards street ferry. The other vessels were anchored below her at intervals, the entire fleet covering a distance of about a mile, so that the lowermost vessel, the "*Richmond*," lay off the barge landing. The positions occupied by the five vessels on the morning of May seventh were substantially as indicated by the plat which appears in Finding VII (*p.* 7). At all times in question there existed at the port of New Orleans a board of harbor-masters appointed and acting pursuant to laws of the State of Louisiana (*port*). Among other things this board was charged with the duty of "regulating and stationing all vessels in the stream of the river within the limits of the port of New Orleans and at the levees thereof. (*XVIII, XIX, p.* 12.)

Upon their arrival the United States vessels did not notify the harbor-master of the fact, nor leave word at the central office. The harbor-master exercised no supervision over the selection of their anchorage, and had no knowledge of the positions occupied by them. (*XXI, p.* 14.)

As they lay, the United States vessels were directly in the track of tows entering the harbor from above and pursuing their proper and customary course, already described. For this reason the positions occupied by the United States vessels were improper; also because they were so high upstream and so close to the New Orleans shore as to be completely hidden from the view of a descending tow, until it had rounded the point at Celeste street, and was right upon them. Their positions were unusual, being higher upstream

and nearer the city shore than vessels had ever before lain at anchor. By reason of their improper and unusual positions, and the fact that they were swinging at anchor they rendered the navigation of the river by tows and other vessels extremely dangerous. On May 5th, and at all times in question subsequent thereto, there was an abundance of room for the fleet on the customary anchorage grounds off Algiers, where the vessels could have lain in perfect safety, without interfering with tows or any other vessels, pursuing their proper courses. (*XI, p.* 9; *XII, p.* 10; *XIII, p.* 10.)

The United States vessels came into port after the "*Future City*" had sailed from St. Louis, and there was no way in which she could have learned their whereabouts, or even that they were in port, until she rounded the point at Celeste street. Upon rounding the point, in a "flanking" position, with no reason to anticipate that there was an obstruction in her way, she discovered the "*Atlanta*" and other warships, lying directly in her track. The "*Atlanta*" was then only 450 feet distant. She was 600 feet or less from the city shore; hence, even a shorter tow than that of the "*Future City*" could not have passed on the inside, in a "flanking" position. With the current carrying her downstream at the rate of five miles an hour, the interval of 450 feet was not sufficient to enable the "*Future City*" to drive her tow outward and clear the "*Atlanta*" on the outside, or to the eastward. Therefore, as soon as she discovered the United States vessels she backed with all the power she had, her object being to check her headway and "straighten up" or bring her tow into a position broadside on to the shore and as close to the shipping moored along it as possible. Under the circumstances, this was the only feasible and proper course and the only one in anywise calculated to prevent collisions with

the United States ships. The width of her tow being but 175 feet the "*Future City*" could have passed between the "*Atlanta*" and the city shore, if there had been sufficient time and space to "straighten up" the tow. But as we have seen the "*Atlanta*" lay at anchor close under the point where she was hidden from view until the tow had rounded it, and then it was impossible for the "*Future City*" to execute the only manœuvre, calculated to avoid a collision. Although the "*Future City*" was ably and properly handled and did her utmost to keep clear of the "*Atlanta*," backing until her stern wheel was so close to the vessels moored along the bank that collision with them was escaped with difficulty, towboat and tow, still in a "flanking" position, were carried downstream by their headway and the current of the river. On reaching the "*Atlanta*," barge "73," the lead barge of the tow on the port or downstream side, came into collision with her, striking the ram of the cruiser broadside on, about amidships. A large hole was stove in the barge, which filled and sank with all of her cargo on board, and became a total loss. To save the rest of the tow barge "73" was cut loose.

By this collision the "*Future City*" and the rearward end of the tow were swung slightly downstream and out from the shore. The towboat did not lose control of the tow and continued to back with all of her power, seeking to pass inside of the "*Galena*," which was the second war ship in the line. But the "*Galena*" was only some 400 feet astern of the "*Atlanta*," and in this short space it was not possible for the "*Future City*" to recover from the position into which she had been thrown by the collision with the "*Atlanta*," and also to "straighten up" her tow. Carried as before by the downward flow of the river the tow was borne down upon the "*Galena*," which was less than 600 feet distant from the city shore, and barge "68," the

lead barge on the starboard side, came into collision with her and was sunk with all of her cargo on board becoming a total loss. (*IX and XI, p. 9; XVI, pp. 11–12.*) In this collision, the lines and fastenings of the tow were parted and the rigging of the "*Future City*" greatly damaged, so that although she did her utmost to control the six remaining barges and prevent further collisions with the United States ships, barge "58" broke loose and was carried down stream, coming into collision with the "*Richmond*" and thereby sustaining great damage and the loss of part of its cargo. (*XVI, p. 12.*)

Under these circumstances the Court of Claims found that the collisions were the result of negligence on the part of the officers in command of the United States vessels, in bringing them to anchor in improper and unusual positions, and in causing them to be anchored on swinging chains. (*XVII, p. 14.*)

The loss sustained by the Transportation Company as the result of the collision was fixed at $19,808.85 (*XVI, p. 12*). Judgment, in favor of the claimant, was entered on *March* 21, 1898 (*p. 35*). On the *5th* of *May* following, the United States applied for an appeal (*p. 36*) but did not perfect it by asking for its allowance until *May* 21, 1900 (*p. 45*). On *November* 11, 1898, the United States filed a motion for a new trial (*pp. 34–41*). It happened that this was before the end of the term at which the judgment was entered, but that fact is not material, for the statute (*R. S. U. S., Sec.* 1088) permits the United States to file such a motion at any time within two years after a judgment has become final, even though it has been affirmed on appeal. This period of two years could not commence to run as long as the application for an appeal remained pending. After some months of delay, the motion was heard. It contained new matter. Re-

citals of fact contained in it and affidavits appended to it were utterly inconsistent with evidence theretofore adduced by the United States and with facts which counsel for the United States had asked the court to find and which it had found. On *December* 18, 1899, it was overruled. At the time of overruling it, the court made an order by which its findings were amended (*p.* 41). Two findings were stricken out (*see XVII and XXIII*, 33 C. Cls., 260, 262–263). For one of them (*XXIII*) a new finding was substituted. Again, on *January* 23, 1900, the United States filed a motion for new trial (*pp.* 41–43). It filed also a motion for the amendment of the findings of fact (*pp.* 43–45). After hearing, both of these motions were overruled on *May* 14, 1900. At this time the court withdrew the findings filed on March 21, 1898, as amended on December 18, 1899, and in lieu of them filed new ones. It also filed a new opinion (*p.* 45). The new findings and opinion appear in the record. In certain particulars these differ from the findings as amended on December, 18, 1899; but all facts which are really material and essential to the support of the judgment, appear, now, as they did in the original findings. On *May* 21, 1900, the United States asked for the allowance of an appeal from the judgment of *March* 21, 1898, as prayed by its application of *May* 5, 1898. An appeal was allowed, accordingly (*p.* 45).

## Questions Raised on this Appeal.

Counsel for the United States specify sixteen matters in which they contend that the Court of Claims committed error. They assert: (1) That the judgment, from which they are appealing, was rendered null and void by the amendment of the findings of fact, made after judgment

(*Applts. Brief, p.* 11); (2) that the United States vessels did not come to anchor and remain in improper positions and in an improper manner, and thereby cause the collisions (*Applts. Brief, pp.* 11–13); (3) that the "*Future City*" was in fault (*Applts. Brief, p.* 12), and (4) that the claimant is not entitled to recover the damages awarded (*Applts. Brief, p.* 13).

A separate discussion of each matter specified is unnecessary. We submit: I. *The judgment herein is valid and this appeal must be heard upon the facts recited in the findings;* II. *The* "FUTURE CITY" *and her tow pursued the proper course and were not at fault;* III. *The United States vessels, without necessity or excuse, came to anchor and remained in unlawful and unusual positions, where their presence rendered the navigation of the river by certain vessels extremely dangerous. In so doing they were guilty of negligence;* IV. *The collisions were the result of negligence on the part of the officers in command of the United States vessels;* V. *The claimant (appellee) is entitled to recover the full sum at which its damage has been fixed.*

## ARGUMENT.

### I.

### THE JUDGMENT HEREIN IS VALID AND THIS APPEAL MUST BE HEARD UPON THE FACTS RECITED IN THE FINDINGS.

Unless special provision be made to the contrary, cases like this which have been referred to the Court of Claims for adjudication, by special act of Congress, are to be governed by the same rules as cases, arising under the general jurisdiction of that court. The special statute under which this case was brought to trial (p. 5) provides

that the right of appeal shall be the same "as in other cases." Appeals from the Court of Claims are governed by the order of this court in reference thereto (*Rules, Supreme Court of the United States, pp.* 31–32). One of these (*Rule* 4) provides:

> "In all cases in which either party is entitled to appeal to the Supreme Court, the Court of Claims shall make and file their findings of facts and their conclusions of law therein, in open court, before or at the time they enter their judgment in the case."

In compliance with this rule, the Court of Claims did file its findings and opinion, at the time of entering judgment. (*P.* 41: *See* 33 *C. Cls.* 251). These were based upon the evidence before the court at the trial. The claimant did not ask for an amendment of the findings. The court made no amendment of its own motion. The United States asked for a new trial and also for the amendment of the findings. The amendments were based upon the motions filed by the United States after judgment and *ex parte* affidavits, appended to them. They were made prior to the allowance of the application for this appeal and, therefore, while the Court of Claims had control of the case. (*Ex parte Roberts*, 15 *Wall.* 384; *Ex parte Russell*, 13 *Wall.* 664; *Ex parte United States*, 16 *Wall.* 699.) So long as it retained control of the case and the record, it was competent for the Court of Claims to correct mistakes in the findings, when brought to its notice, so that the findings sent up on appeal should state the truth. (*Ex parte Roberts*, 15 *Wall.* 384; 8 *C. Cls.* 118; *Kirk* v. *U. S.* 28 *C. Cls.* 276, 279.) Other courts in this country possess and exercise the same power over their records until there pass from their control by appeal, by the termination of a term of court, or by some other

limitation prescribed by local statute. (*North* v. *Peters*, 138 *U. S.* 271; *Goddard* v. *Ordway*, 101 *U. S.* 745, 751; *Ex parte Lange*, 18 *Wall.* 163.)

Appellant's counsel attempt to distinguish the case of *North* v. *Peters* (*supra*) from the one at bar. That case came before this court on appeal from the Supreme Court of the Territory of Dakota, where the statute governing the entry of judgments resembled in some respects the rule (*supra*) which obtains in the Court of Claims. In delivering the opinion of the court Mr. Justice Lamar said:

> "The appellant, in support of his motion for a new trial, claimed that the court had omitted to find upon certain material issues in the case. The court refused to grant the motion, and made additional findings, more explicitly responsive to the questions presented by the pleadings. *We are of the opinion that the court, if, in the consideration of such a motion, it considers that material findings have been omitted or imperfectly stated, has authority to make such additional findings as will cure the omission, so that its record will be amended and made to conform to the truth.* When the court below made its decree, it made a concurrent order giving the defendant (the appellant) until a certain day within which to prepare and serve his motion for a new trial. The record, therefore, had not passed out of the control of the court by appeal when those additional findings were made."

This authority is directly in point. The order of the Court of Claims, entered on May 14, 1900 (*p.* 45), by which it withdrew its former findings and opinion, likewise announced the filing of new findings and a new opinion, in lieu of those withdrawn. There never was an instant when the judgment in this case was not supported by findings of fact and conclusions of law, filed in

conformity with the rule of this court, for the withdrawal of the old and filing of the new findings and conclusions, were contemporaneous. In effect the proceeding was an amendment and nothing more.

Counsel for the United States have not pretended to confine their argument to matters contained in the record. While we protest against this, and ask to have the case reviewed in accordance with the rules of this court, the appellant's departure from the rules constrains us to show the court how it happened that the Court of Claims made incorrect statements of fact in its original findings.

Certain testimony, filed in the case by the United States, tended to show that the United States vessels in question had called at the port of New Orleans in the year 1888, prior to May fifth, and had then consulted the harbor-master with regard to a suitable anchorage for them, on their proposed return in May. The harbor-master testified that he had told them where they could anchor without interfering with other vessels. At the trial counsel for the United States insisted that the harbor-master had plenary authority with respect to the anchoring of vessels in the harbor of New Orleans, and that having followed his directions the United States vessels were not responsible for the collisions of May 7th. The court found that the harbor-master was consulted and did designate an anchorage for the United States ships near the Algiers side of the river, but that on their return to port they anchored on the New Orleans side, contrary to the harbor-master's advice. With its motion for new trial (*pp.* 36–41) the United States filed certain affidavits by officers of the navy, who were on board the United States ships at the time of the collision. In these it was averred that the ships had not called at New Orleans earlier in 1888, and

had never consulted the harbor-master about an anchorage. To be sure such affidavits ought not to be treated as evidence, but if they were it was for the claimant to complain, and certainly not for the United States, which alone was responsible for the mistake originally made by the court, and which alone was responsible for its correction. The argumentative matter and many of the allegations of fact, contained in the defendant's motions were not adopted by the Court of Claims, and the motion was overruled; but this does not justify the present contention of the United States that the correction of the findings vacated the judgment, for the findings, as amended, contained as ample support for the judgment as they did before.

The authorities upon which the appellant relies relate to causes tried in State courts or governed by local statutes where the expiration of the term at which judgments were entered deprived the courts of control over the record. None of them deal with a condition of things such as that prevailing in the Court of Claims.

Again, if the United States had wished to attack the judgment, on the theory that it was rendered null and void by proceedings had subsequent to its entry, the proper way to do this would have been by a motion filed for that purpose in the court below or by petition to this court for a writ of *mandamus*. The appeal, which the United States has taken, of necessity, admits the existence and the finality of the judgment. (*Ex parte Roberts*, 15 *Wall.* 384; *Ex parte Russell*, 13 *Wall.* 664; *Ex parte United States*, 16 *Wall.* 699, *supra.*)

As heretofore suggested we have unwillingly departed from the record and discussed many things which this court has frequently declined to consider on appeal from the Court of Claims; but this course was forced upon us by the departures made by counsel for the United States.

We submit that it is not competent to question the truth of the facts recited in the findings. The rules of this court which have the same force and effect as acts of Congress, provide (*Order in reference to appeals from the Court of Claims, Rule I. p.* 31):

> "In all cases hereafter decided in the Court of Claims in which, by the act of Congress, such appeals are allowable, they shall be heard in the Supreme Court, upon the following record, *and none other:*
>
> "1. A transcript of the pleadings in the case, of the final judgment or decree of the court, and of such interlocutory orders, rulings, judgments, and decrees as may be necessary to a proper review of the case.
>
> "2. A finding by the Court of Claims of the facts in the case established by the evidence in the nature of a special verdict, *but not the evidence establishing them;* and a separate statement of the conclusions of law upon said facts, upon which the court founds its judgment or decree. The finding of facts and conclusions of law to be certified to this court as a part of the record."

The appellant complains that the Court of Claims did not find certain facts as requested by it (*Applts. Brf., pp.* 13–14). Evidently this is not an objection which can be considered.

For the purposes of this appeal, the facts set out in the findings "*must be taken as undisputed.*" (*U. S.* v. *Adams*, 6 *Wall.* 101; *McClure* v. *United States*, 116 *U. S.* 145, 149–153.)

The findings contain certain propositions, which, indisputably are pure matters of fact. Among these are statements, which describe—

(1) The course of the Mississippi at and about the port of New Orleans, the width of the river, and the direction and force of its currents.

(2) The relative positions of certain streets, buildings, and other fixed objects on the city shore.

(3) The location and availability of the customary anchorage ground for vessels lying in the harbor.

(4) The positions occupied by the United States ships and the fact that they did not report their arrival to the harbor-master, nor consult him with regard to their anchorage.

(5) The ability of the "*Future City*" and the efficiency of her officers and crew and the make-up and dimensions of her tow.

(6) The course pursued by the "*Future City*" on entering the harbor. The local usage of navigation, governing the course of descending tows. The reasons for its adoption. The adherence of the "*Future City*" to the usage.

(7) The belated discovery of the United States vessels by the "*Future City*," and the reason why it was not possible for her to see them sooner.

(8) The collisions and the damage and loss resulting from them.

Beside these things the court has found that the "*Future City*" pursued the proper course and did all that could have been done to avoid the collisions; that the positions occupied by the United States vessels were improper, and that the collisions were the result of the negligence on the part of the officers in command of the United States vessels. While these are conclusions, they are conclusions of fact, and as such it would have been proper for the Court of Claims to include them in its findings if the case had arisen under the court's general jurisdiction. In the present case it was not only proper, but necessary, because the special statute under which the case was brought to trial made it the duty of the court to pass upon the question of negligence as a question of fact

(*Act August* 3, 1894, *second proviso, p.* 5). This court has held that a question of fraud or mistake is one of fact upon which the Court of Claims should pass, as upon a question of fact, and that its finding thereon is not to be disputed on appeal (*U. S.* v. *Adams*, 6 *Wall.* 101, 112; *Clark* v. *U. S.*, 18 *U. S. Reports, L. Ed.* 915). In the case of *United States* v. *Adams*, it was argued, on appeal, that a finding to the effect that a certain transaction was fraudulent was a conclusion of law, and hence improperly included in the findings of fact, but it was said:

> "*This is precisely the character of finding which the rule of this court was intended to produce.*"

The existence of fraud and the existence of negligence are questions of the same kind. A finding upon either is a conclusion of fact, arrived at, by the application of legal principles to circumstantial facts. We submit that the findings, particularly the XXII, wherein it is held that the collisions were the result of negligence on the part of the officers in command of the United States vessels, conclusively dispose of the case, leaving no question of law to be passed upon here.

If, however, this court should deem it proper to review the findings, such review should not extend beyond an inquiry to ascertain whether the conclusions of fact are justified by the circumstantial facts found. (*United States* v. *Crusell*, 14 *Wall.* 1; *United States* v. *Pugh*, 99 *U. S.* 265). In making this inquiry no consideration can be given the allegations of fact and arguments contained in the defendant's motions for new trial and for the amendment of the findings of fact. These motions were addressed to the Court of Claims to determine, in the exercise of its sound discretion, whether fraud, wrong or

injustice had been done the United States by the findings or the judgment. The orders overruling them were not "interlocutory orders" and were not appealable. The motions do not form a proper part of this record. (*Rules of the Supreme Court of the United States order relating to appeals from the Court of Claims, Rule I; Kellog* v. *United States*, 19 *C. Cls.* 73, 76; *Holder* v. *United States*, 150 *U. S.* 91; *Blitz* v. *United States*, 153 *U. S.* 308; *Charley Smith* v. *Mississippi*, 162 *U. S.* 592; *Addington* v. *United States*, 165 *U. S.* 184).

## II.

THE "*Future City*" AND HER TOW PURSUED THE PROPER COURSE AND WERE NOT AT FAULT.

Where a collision has occurred between two vessels, one of which was at anchor and the other in motion, the presumption arises that the latter was at fault. But this presumption may be rebutted by proof that the moving vessel exercised ordinary care and that the collision was caused by the fault of the anchored vessels. (*Spencer on Marine Collisions, Sec.* 120, *The "Scioto,"* 2 *Ware U. S.*) 365.)

In the first place our inquiry is directed to the "*Future City*" and the course pursued by her before she sighted the United States vessels, and thereafter. We have seen from the findings (*V–VI*) that the tow was of moderate size and made up in accordance with the usage prevailing on the Mississippi. The "*Future City*" had ample power to control and navigate it. It did not become unmanageable until the fastenings were parted in the collision with the "*Galena*" (p. 11). The officers of the "*Future City*" were skillful and vigilant. She had an adequate and competent

crew. In entering the harbor of New Orleans she adhered to the customary course of descending towboats with tows. This course had been followed because it had been found to be the only one practicable, and had come to be recognized as a local usage of navigation. Being ignorant of the presence of the United States fleet, the "*Future City*" would have had no reason or excuse for departing from the customary course. Vessels had never been known to lie at anchor in the part of the river which she intended to traverse. Without risk of collision, she could pass vessels ascending the river in their proper course, as she did pass the "*Mabel Comaux*."

It cannot be denied that a variety of reasons founded on necessity or expediency have led to the adoption of local usages of navigation in many ports and other places. These are specially devised to meet conditions peculiar to the place of their adoption. They are governed by such things as the formation of the harbor, its shores, and channels, and the direction and force of its currents and tides, all considered with reference to the number and diverse character of the vessels engaged in the commerce of the port. Every vessel, from whatever part of the world she may come, is bound to take notice of and conform to such local usages. (*The "James Gray"* v. *The "John Fraser,"* 21 *How'd*, 184.) In courts of admiralty, such usages and local rules, sanctioned by authority of a State, are taken as evidence of what is a vessel's duty, under the circumstances provided for. (*The "Raithwaite Hall,"* 30 *L. T. (N. S.)* 233; *The "Vanderbilt,"* 6 *Wall.* 225; *Spencer on Marine Collisions*, § 21.)

Even where a particular custom involves a departure from the general rules of navigation, if it has received general sanction in the locality where it prevails, and has been found necessary or reasonable, it will be respected

in determining the propriety of a vessel's course. (*Spencer on Marine Collisions*, § 22; *The "Fovorita,"* 18 *Wall.* 598.)

Appellant's counsel contend that the "*Future City*" was at fault in entering the harbor of New Orleans without ascertaining what vessels, if any, were lying in her track. This is answered by the findings, which show that she entered the harbor in the manner customary for vessels of her class; also that she had no reason to expect to find vessels in her way, because none had ever been known to anchor on the city side of the river and close under the point at Celeste street. She was right in adhering to the established custom of the locality.

In the case of the "*John L. Hasbrouck*" (93 *U. S.* 405, 407), which is cited by the appellant (*App'l'ts Brief pp.* 162–163), it was said:

> "Sailing vessels, especially when descending the river, usually keep well over to the western side of the channel, leaving the eastern side of the same for the uninterrupted passage of vessels propelled by steam. Usage has sanctioned that course of navigation, where there are no impediments or natural obstructions in the pathway of ascending or descending vessels. Vessels of all kinds, whether propelled by steam or sails, are allowed and expected to vary their respective courses to correspond with well known sinuosities of the navigable portion of the river and to avoid the dangers of navigation arising from rocks, shoals and sand bars, as well as from curves and bends in the banks of the river or channel of navigation."

Therefore, the "*Future City*" did exactly what she was "*allowed and expected*" to do.

In the case of the "*Victoria*" (37 *C. C. A.* 40), it appeared that a flotilla consisting of 28 loaded canal boats

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in tow of three tugs was proceeding down the Hudson river. Before reaching the Tappan Zee, a wide part of the river, it was overtaken by a severe storm, which had been predicted by the Weather Bureau, and of which warning had been given by proper signals. The flotilla was not capable of withstanding a severe storm and was broken up by the heavy seas encountered in the broad water. Several of the canal boats foundered. Their owners brought suit against the tugs, claiming that they were guilty of negligence in keeping on across the Tappan Zee without sending ahead one of the tugs as a scout to ascertain the character of the sea. The district court entered decrees against the tugs. This decision was influenced very largely by proof of a custom prevailing in New York bay and other waters opening into the ocean, by which a tug is required to go out ahead, in stormy weather and make an examination of the sea before taking its tow into an exposed situation. It appeared, however, that this custom had not been followed on the Hudson river, where it was usual for tugs to proceed without regard to weather conditions, and ordinarily it had been found safe for them to do so. On appeal the Circuit Court of Appeals reversed the decree of the lower court, holding that the tugs could not be held in fault for proceeding with the tow in the manner sanctioned by local custom, and that they were under no obligation to take the precaution required by the custom prevailing in another port of the same river.

In several cases where the facts were similar to those under consideration, it was held that the moving vessels were blameless, while the vessels with which they collided, having anchored in improper, exposed, or unusual positions, were guilty of fault and liable for the losses which ensued.

*Fawcett* v. *Steam tug "L. W. Morgan,"* (6 *Fed. R.* 200.) The towboat "*Boaz,*" with nine barges in tow, while descending the Ohio river, encountered difficulties, in which one of her barges was crippled. Her captain did not know the extent to which the crippled barge had been injured; and, expecting to resume his voyage almost immediately, came to anchor, in the towboat channel, below a point of land. There was anchorage ground about a mile below the place where the "*Boaz*" and her barges came to anchor, whither she could have taken her barges, and remained with them, at anchor, in safety. The towboat "*Morgan*" left the same port as the "*Boaz,*" some hours after the latter, with eight barges in tow. Six of them were made fast ahead of her, and two were alongside. The tow thus made up, was about 360 feet long and about 72 feet wide. The officers and crew of the "*Morgan*" knew nothing about the difficulties encountered by the "*Boaz,*" nor did they know that the latter, with her barges, had come to anchor. When about a mile above the anchored "*Boaz,*" the pilots of the "*Morgan*" discovered the lights of the former, but supposed them to be the lights of an ascending steamer. This supposition was a very natural one, under the circumstances. Upon rounding the point below which the "*Boaz*" lay, the "*Morgan,*" for the first time, discovered her and her barges; and observed that she was at anchor. It was not possible for the "*Morgan*" to discover her sooner. Before the discovery of the "*Boaz,*" the "*Morgan's*" engines had been reversed, to check her headway; and, afterwards, she continued to back, with all her power. But, in spite of her best efforts to avoid the "*Boaz,*" she and her tow came into collision with two of the anchored barges, sinking one and injuring the other.

It was proven that towboats with tows, in rounding the

point below which the collision occurred, adopt one of two courses: "steering out," or "flanking." "Steering out" consists in the towboat backing her stern close in shore, thus throwing her head out into the stream, and then driving ahead, at full speed, around the bend. The operation of "flanking" we understand already, it being the course adopted by the "*Future City*" just before the discovery of the United States vessels. The "*Morgan*" chose the first course—that is to say, "steering out." The owners of the injured barges libelled the "*Morgan*"; and in the suit, contended that the collision was occasioned through the negligent manner in which the "*Morgan*" was handled. They maintained that by "flanking" the collision could have been avoided, and that the "*Morgan*" should have rounded the point by "flanking," instead of "steering out." Most of the expert witnesses examined pronounced "flanking" the safer course for a descending towboat to adopt. The court said:

> "*But I cannot adopt this conclusion. To pronounce 'steering out' from the McKees rocks to be negligence* per se *would be to condemn the common practice of some of the best pilots on the river. Was, then, the 'Morgan' censurable for undertaking that mode of navigation on the occasion in question? I think not. When she entered at the head of Brunot's Island, her pilots did not know, and had no reason to suspect, the state of things existing below. They were not bound to anticipate that they would find the libellant's barges projecting into the ordinary towboat channel, at that stage of water, at McKees rocks; and, when they discovered these barges it was too late to attempt to change the 'Morgan's' stern from the land to the bar. Such a manœuver then, with a huge and unwieldy tow, in a five-mile current, before daylight, with stranded barges on the bar, whose precise location was not known, would have been extremely hazardous, if not inevi-*

*tably fatal, to both parties. To effect a landing at that time and place was impracticable, and the 'Morgan' had not power to back up stream, or even to hold her tow against the current. She could not do otherwise than pursue her descending course. The most that could be done was to check the boat's headway by reversing the engine, and this was done.* I AM SATISFIED THAT, AFTER THE DANGER WAS PERCEIVED, ALL THAT WAS POSSIBLE TO AVOID THE CATASTROPHE WAS PROMPTLY DONE, AND I AM OF OPINION THAT, FROM FIRST TO LAST, THE '*Morgan*' WAS BLAMELESS."

It appeared that before this decision was rendered the owners of the "*Morgan's*" barges had brought suit against the owners of the "*Boaz*," in a court of the State of Pennsylvania, claiming that the collision was caused by the negligence of the "*Boaz*," in obstructing the towboat channel. The jury returned a general verdict for the defendants, without stating the ground upon which they based their finding. With regard to this verdict, the District Judge (U. S.) said (6 *Fed. R.* 203):

"It is highly probable that the jury, taking a charitable view of the conduct of the defendants, found a verdict in their favor, based upon the conclusion that an emergency and reasonable necessity existed for placing their ('*Boaz's*') barges where they did; *but assuredly there was no absolute necessity for so doing*, AND, WHEN THE LIBELLANTS ('*Boaz*') CHOSE TO PUT THEIR BARGES IN A PLACE OF MANIFEST DANGER, IN THE WAY OF UNMANAGEABLE TOWS, WHICH THEY KNEW WERE COMING OUT ON THAT RISE, WITH PILOTS IGNORANT OF THE FACTS, THE LIBELLANTS MUST BE HELD TO HAVE TAKEN THE CONSEQUENT RISKS OF COLLISIONS. *Obviously, the case is not one for the application of the rule which requires* A STEAMER TO STEER CLEAR OF A VESSEL AT ANCHOR."

The facts in this case are strikingly similar to those in the case at bar, except in these respects: The United States vessels have offered no explanation or excuse for their conduct in coming to anchor in the track of tow-boats, while the "*Boaz*" did so because she had met with an accident. The "*Future City*" neither saw the United States vessels, nor had any warning, whatsoever, of any obstruction, in the river below the point at Celeste street, until she was within 150 yards of the "*Atlanta*;" while the "*Morgan*" saw the lights of the "*Boaz*" at a distance of one mile and made out the "*Boaz*" and her barges at a distance of 400 yards.

*The "Scioto"* (2 *Ware* (*U. S.*) 360).

*The "James Gray"* v. *The "John Fraser,"* (21 *How'd*, 184, *supra*).

## III.

THE UNITED STATES VESSELS, WITHOUT NECESSITY OR EXCUSE, CAME TO ANCHOR AND REMAINED IN UNUSUAL AND IMPROPER POSITIONS, WHERE THEIR PRESENCE RENDERED THE NAVIGATION OF THE RIVER BY CERTAIN VESSELS EXTREMELY DANGEROUS. IN SO DOING THEY WERE GUILTY OF NEGLIGENCE.

We have seen from the findings that the United States vessels came into port on the 5th of May and anchored in the positions which they continued to occupy until after the collisions occurred. They were close to the New Orleans shore—not more than from 500 to 700 feet out from the wharves. The uppermost vessel of the fleet, the "*Atlanta*," was directly below a sharp bend in the river where she could neither see descending vessels, bound for New Orleans, nor could they see her until they had rounded the point and were within 150 yards of her. No vessels

had ever before been known to lie at anchor in such positions. The customary anchorage ground, fixed by local usage, lay well toward the eastern side of the river, or as far as possible from the city's wharves, and a long distance below the bend at Celeste street. There anchored vessels could see and be seen by moving vessels, descending or ascending the river, while still at a great distance. There a good holding ground was to be had, a depth of water sufficient for the largest vessels, and an abundance of room. Furthermore this anchorage ground was not traversed by any vessels, when pursuing their proper and customary courses, so that anchored vessels could lie there in safety without endangering the navigation of the river. Again, a law of the State of Louisiana* made provision for the appointment of a

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* *Voorhees's Revised Laws of Louisana* (2 *Ed.*, *p.* 254), *Secs.* 1679 *and* 1681.

"SEC. 1679. The governor shall nominate and by and with the consent of the Senate appoint five harbor-masters, who shall constitute and be known as the board of harbor-masters of the port of New Orleans, and whose term of office shall be two years; provided, however, that the governor shall have the power to remove from office any of said harbor-masters, upon satisfactory proof made to him of negligence, incapacity, or official misconduct."

* * * * * * * * *

"SEC. 1681. Said harbor-masters, under the rules and regulations to be established by the board, *shall have authority to regulate and station all vessels in the stream of the river Mississippi, within the limits of the port of New Orleans* and at the levees thereof, and remove from time to time such vessels as are not employed in receiving or discharging their cargoes, to make room for such others as require to be more independently accommodated for the purpose of receiving

board of harbor-masters at the port of New Orleans, and prescribed the duties which it should perform and authorized the board to establish regulations for the anchoring of vessels in the stream of the river within the limits of the port. Among other things the board directed that all vessels should, upon their arrival in port, notify the harbor-master in person or report at the central office of the board, whereupon proper anchorages or places of landing for such vessels would be designated (p. 13). The United States vessels utterly ignored the local usage and the local regulations. They made no attempt to ascertain whether any portion of the harbor had been set apart for an anchorage ground, and, if so, its whereabouts. Though the harbor was comparatively small and its commerce well known to be extensive—though it was a matter of common knowledge that the vessels calling at the port included not only seagoing steamers and sailing ships, but all manner of river craft including tows—the

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or discharging their cargoes; and as to the fact of any vessel being fairly and *bona fide* in the act of receiving or discharging, the said harbor-masters are constituted the sole judges. And, further, the harbor-masters shall have authority to determine how far and in what instances it is the duty of the masters and others having charge of ships and vessels to accommodate each other in their respective situations. And if any master or other person shall oppose or resist any harbor-master in the exercise of the duties of his office, he shall, for each offence, forfeit and pay the penal sum of $50, to be sued for by the treasurer of the charity hospital; provided, however, that if any person shall consider himself aggrieved by the decision of any individual harbor-master he shall be at liberty to appeal to the board, and their concurrence shall be given before such decision is carried into effect."

United States vessels utterly neglected to make inquiry about the usages and regulations of the port or the courses customarily pursued by vessels of these diverse classes. In short they ignored the rights and necessities of the commerce of the port. It is obvious that by making inquiry of the local authorities as they should have done all risk of their inflicting or sustaining damage, by their presence, whould have been avoided. In so doing they were quilty of negligence. (*The "James Gray"* v. *The "John Fraser,"* 21 *How'd*, 184; *The "Vanderbilt,"* 6 *Wall.* 225; *The "Raithwaite Hall,"* 35 *L. T.* (*N. S.*) 233; *Spencer on Marine Collisions*, §§ 21–23, 106.)

Had they exercised reasonable prudence the officers in command of the naval vessels must have seen that their positions were improper. They were close to the levees of New Orleans, where vessels of all kinds were constantly arriving and departing. The "*Atlanta*" was so close under the point at the foot of Celeste street that she could not see vessels, which might descend the river, between the city shore and midstream, nor could such vessels see her until they had rounded the point and a collision had become imminent. Had the officers, in command of the naval vessels, given the matter proper consideration, they could not have failed to see that a descending vessel, and particularly a tow, intending to land on the city side, below Celeste street would naturally stand in toward the point, unless warned of some unusual obstruction in the river below it. They must have seen that when such a vessel or tow had rounded the point and without previous warning, she would be greatly embarrassed by their presence. They must, also, have seen that on the other side of the river and a short distance lower downstream there was an abundance of room for the entire fleet, where, lying at anchor they could be

seen by vessels, approaching from all directions while there still remained a sufficient interval of time and space to avoid any difficulty. In neglecting to heed the warning conveyed by these physical surroundings the naval officers were grossly at fault.

> *Spencer on Marine Collisions*, § 99. * * * "*It is negligence for a vessel to moor so near the entrance to a harbor that shipping, entering in stress of weather, is liable to become embarrassed by its presence; and where the usual difficulties of navigation make the entrance to a harbor a dangerous undertaking, it is especially reprehensible for a vessel to moor in a situation tending to increase those difficulties.*"
>
> *Id.* § 106. "Where a vessel is at anchor, in a proper place, and is observant of the precautions required by law, it is not liable for damages sustained by a vessel in motion colliding with it; *but where it anchors in an unlawful position, or fails to observe the statutory requirements* AND SUCH OTHER PRECAUTIONS AS GOOD SEAMANSHIP WOULD SUGGEST, IT MUST SUFFER THE CONSEQUENCES ATTENDING A VIOLATION OF THE LAW."

*The "Scioto,"* 2 *Ware*, 360. Without reviewing the facts in this case, which would require some considerable space, we shall simply give the substance of the rule laid down for the anchoring of vessels, when in port:

> "*A vessel ought not to be moored and lie in the channel, or entrance to a port, except in cases of necessity;* OR, IF ANCHORED THERE FROM NECESSITY SHE OUGHT NOT TO REMAIN THERE LONGER THAN THE NECESSITY CONTINUES. IF SHE DOES AND A COLLISION TAKES PLACE WITH A VESSEL ENTERING THE HARBOR, SHE WILL BE CONSIDERED IN FAULT."

This rule is founded upon the maxim: "*Sic utere tuo, ut alienum non lædas.*" A vessel may have the right to

anchor in the entrance of a harbor where vessels entering and leaving it frequently pass. She may not be at fault for remaining in such a position, if stress of weather or other necessity compels it. But she cannot, voluntarily, remain there, to obstruct and perhaps endanger the passing of other vessels, without rendering herself liable for any damage occasioned by her presence.

*Fretz et al.* v. *Bull et al.*, 12 *How'd*, 466. A collision occurred between a flatboat and a steamer, both of which were descending the Mississippi river. At the time of the collision, the flatboat was in an eddy, and unable to direct its course, with the same degree of certainty and promptness, as a steamer. Shortly before the collision, the flatboat was on the eastern side of the stream and the steamer was running in the middle. The steamer turned out for another flatboat, and then took a course which carried her quite close to the first flatboat. This she need not have done, for there was an abundance of space, on both sides of the river, for her to have passed both flatboats, without running near either of them. After the steamer's bow had passed the flatboat, the latter was caught by the eddy, carried out, and brought into collision with the steamer.

The court held (per Mr. Justice Wayne):

> "It cannot be doubted that the collision was produced by the carelessness, or ignorance, or disregard of her (the steamer's) pilot, of the consequences which those eddies might produce, in the positions in which she and the flatboats then were. * * * *The evidence shows that the steamer could have been differently navigated from the manner in which she was, and that the course she was running though it was, in the judgment of the pilot, the best, under the circumstances, yet, it was the course which caused the*

*collision; and, that another might have been taken, by which there would have been no possibility of a collision.*"

It will be noted that it was not the steamer that ran into the flatboat; but the flatboat that was carried by the current and collided with the steamer.

The effect then of the decision is this: The steamer was liable, in that: she knew, or should have known the possible effect of the eddies; she had abundant room to shape her course, so that a collision would be impossible, not merely improbable; and she was negligent, in failing to do so.

"*The Jeremiah Godfrey*," 17 *Fed. Rep.* 738. In his opinion Coxe, J., said:

> "The entrance to the harbor at Cleveland, Ohio, is through two nearly parallel piers, extending into Lake Erie 1,650 feet. They are 200 feet apart, except at their extreme end, where they are 250 feet apart. On the evening of October 4, 1881, the '*Jeremiah Godfrey*' lay moored to the eastern pier, 300 or 400 feet from the outer end. The channel at that point is about 230 feet wide. The '*Godfrey*' is a large, three-masted barge, 198 feet long and 33 feet beam. She depends upon other vessels to tow her. She took her position, at the point described, during the afternoon of the preceding day, and remained there continuously, awaiting her steamer. * * * On the same evening, the schooner '*Moonlight*' appeared in the offing, and signaled for a tug. She was loaded with iron ore and drew 14 feet of water. Her length of keel is 285 feet, her beam 33 feet 6 inches. * * * The tug '*Dreadnaught*' started to bring her in, but failed to do so, owing to the bursting of a water gauge. * * * The schooner was then in close proximity to the piers, had only her head sails set and was in imminent danger of going

ashore. She attempted to enter alone, but in doing so took what, in nautical parlance, is known as a 'lee wipe' and struck heavily against the west pier. The effect was to head her towards the east pier with which she collided a few minutes afterwards. She * * * then sagged up the river until she fouled with the '*Godfrey*.' Her bow was held at the east pier by the forerigging of the barge, while her stern was chafing and pounding on the west pier.

"At the time of the collision, it was dark, and blowing fresh, diagonally across the entrance to the harbor. A libel was filed against the '*Godfrey*' by the owners of the '*Moonlight*.'

"The libellants argued that the '*Godfrey*' was negligent in two particulars: *First*, in lying at an improper place; *second*, in maintaining her position, when, by abandoning it, she could have released the '*Moonlight*.' The respondent disputes these propositions and insists that the '*Moonlight*' was negligent in entering the harbor in the manner described."

After considering the "*Moonlight's*" course, and holding her to have been at fault in several particulars, the court said:

"Turning now to the '*Godfrey*,' was she moored in an improper place? Respondent invokes in his defence an alleged custom for vessels to lie at this point. It is thought, however, that the evidence does not go as far in this direction as the respondent insists. It is undoubtedly true that it is usual for vessels, in fair weather, to drop down to the end of the piers, there to remain a reasonable time for the expected steamer. But it does not, therefore, follow that a vessel may with propriety lie there at night, with a heavy sea rolling and a high wind blowing from the north. Indeed the evidence establishes the contrary. *A vessel entering at such a time has* A

RIGHT TO ASSUME *that the* WHOLE ENTRANCE, *at best a narrow one*, IS FREE FROM OBSTRUCTIONS. * * * It was never intended that these channels should be blocked by moored or anchored vessels. Accordingly it has frequently been held that it was negligence to anchor in the track of vessels, at night, without taking extraordinary precautions against danger. It must be said upon all the evidence in the case, taking into consideration the state of the wind and waves, the time, the warnings, and all the circumstances, that the '*Godfrey*' was at fault in lying where she did."

The fault of the "*Godfrey*" being a contributing cause of the collision, the damages sustained by both vessels were apportioned, the "*Moonlight's*" right to recover her full damage being defeated by fault on her part.

In the case at bar, the fault of the United States vessels was the same as that committed by the "*Godfrey*;" but on the other hand, the "*Future City*" was blameless. She adopted all proper and customary measures needful, to insure the safe conduct of her tow to its landing without endangering the safe navigation of the river by other vessels; while the "*Moonlight*," prior to the collision, placed herself in a perilous position, which she could have avoided by reasonable prudence, and in endeavoring to extricate herself, adopted a course—possibly the best for her—yet a course, which coupled with the "*Godfrey's*" negligence, resulted in the collision.

*Martin* v. *Five Canal Boats*, 24 *Fed. R.* 500. The sloop "*Flash*," in a storm, came to anchor off a coal pier, at Jersey City. At the time of casting anchor she was notified by employees, on the pier, that she would be in the way of boats coming there for coal and water. In order to get out of the way the "*Flash*" payed out cable, leaving her anchor where it was. With 80 fathoms cable

out, the wind carried her into a slip 400 feet wide between the coal pier, and a dock, at the outer end of which five canal boats were moored. The "*Flash's*" cable extended nearly across the entrance to the slip. The storm increased and it became necessary to move the canal boats further into the slip. In moving them they became entangled with the sloop's cable, came into collision with her, and did her some damage.

The owner of the sloop libeled the canal boats, claiming that the collision was caused by their negligence.

The court said (per Nixon, J.):

> "I think the weight of evidence is that timely notice was given and that the respondents are not liable for any damage which arose to the libellant, by continuing his boat in such an anchorage. But independent of the evidence on this point, the libellant has hardly presented a case which entitles him to damages for injury to his sloop. *She was lying at anchor in an improper place and in an improper manner*, AND THE LAW IS WELL SETTLED THAT SHE MUST TAKE THE CONSEQUENCES RESULTING THEREFROM."

[NOTE: In this case the canal boats did not claim or prove damage.]

The "*Margaret J. Sanford*," 30 Fed. Rep. 714. The tug "*Margaret J. Sanford*" with a car float, in tow, alongside, was bound for a dock, situated on a canal, 157 feet wide. On reaching the entrance, on the ebb tide, she found it, obstructed by vessels, projecting partly across, from above and below, which made it difficult and dangerous of access, in that state of the tide. Instead of waiting for slack water or getting help, the tug pushed on slowly and ran into the bow of the ship "*Tantallon*," which encroached some 15 or 16 feet upon the entrance. In his opinion, Brown, J., said:

"I cannot hold vessels, lying like the '*Tantallon*," with her bows projecting across the entrance of ships at the entrance of a narrow canal, frequented by other craft, free from fault. Such projections are obstructions to rightful navigation, in thoroughfares designated to be kept open, where, without any obstructions, there is none too much room for reasonable navigation. This passage was much used for floats of this description. The tug and the float were consigned to the dock within this canal. They had a right to go there, and not to be kept unreasonably, waiting for safer means of entrance. *The interests of navigation require that such entrances should be kept open, and that encroachments, that make the passage dangerous, should be held wrongful on the part of the projecting vessels, as respects other vessels bound in and out.*"

While the court found the "*Sanford*" "chargeable with fault for making the attempt" to enter the canal, under the conditions existing, it held that the "*Tantallon*" was in fault, and that her negligence was a contributing cause of the collision.

*The "Fort Lee,"* (31 *Fed. R.* 570). In this case it appeared that a ferry-boat, coming down the Hudson river to her slip, on a strong ebb tide, at her usual rate of speed, came into collision with a schooner moored near the outer end of a pier. In his opinion Judge Brown said:

"There is no doubt, upon the evidence, that the schooner, whether her bows actually projected beyond the line of the pier or not, did obstruct and interfere with the usual course that the ferry-boat was intended to take upon the ebb tide. At low tide, the schooner was aground as she lay; but at high tide could have been moved farther back. The weight of evidence, moreover, is to the effect that her bowsprit, after she was brought alongside the pier, did

> project somewhat over its outer end. In either case she was violating the rules of the harbor-masters, which required both that such vessels should lie with their bows in, and also, so as not to obstruct and interfere with ferry-boats of the city. There was nothing to prevent the schooner from complying with these regulations, * * * before the ferry-boat came down. The schooner must, therefore, be held chargeable with fault, contributing to the collision."

The ferry-boat was not allowed her full damages because the masts and bowsprits of the schoner were in plain sight for some time before she reached the pier, and she could have avoided the collision by stopping or changing her course. In the present case the situation was very different. The "*Future City*" did not see the United States vessels, which were under a point and hidden from view until she was right upon the "*Atlanta.*" Hence, there would be no justification for a division of damages.

The appellant's counsel contend that the United States ships were under no obligation to signify their presence to approaching vessels, nor to endeavor to avoid collisions by veering chain. This is not in accord with the authorities. In the case of the "*Richmond*" and the "*E. Heiperhausen* (26 *U. S. App.* 183), a vessel anchored near shore in New York harbor and not on proper anchorage ground was struck by the tail of tow 1,600 feet in length. Some of the vessels contained in the tow were lost. Their owners sued the tug and the anchored vessel. It was held that the tug was in fault for failing to send her helper back to control the tail of the tow when passing the anchored ship, which had been in plain sight for some time. The anchored ship was in fault for taking an improper position and in failing to let out chain, which would have tended to avoid collision.

It cannot be successfully maintained that the collision was the result of inevitable accident, and thus relieve the United States vessels from responsibility.

In *Spencer on Marine Collisions* (*Sec.* 195), it is said:

> "Inevitable accident, as defined by *Mr. Justice Swayne*, in the case of the "*Grace Girdler*," 7 *Wallace*, 196, '*is where a vessel is pursuing a lawful vocation, in a lawful manner, using the proper precautions against danger, and an accident occurs.*' * * * Where the collision occurs wholly from natural causes, without negligence or fault on the part of either of the respective vessels, or, as is stated in the case of *the "Nicholson" and the "Adam,"* 28 *Fed. R.* 889, '*Where safe navigation is rendered impossible, from causes which no human foresight can prevent, when the forces of nature operate in unforeseen and uncontrollable fury, so that man is helpless, and the stoutest ship and the wisest mariner are at the mercy of winds and waves, it is inevitable accident.*' * * * *Where it appears that either party, or both, are at fault, that everything was* NOT *done that* COULD *and* SHOULD *have been done, that the collision* MIGHT *have been* PREVENTED *by the use of known and proper precautions, by the display of proper nautical skill and judgment,* IT NO LONGER BECOMES INEVITABLE ACCIDENT, BUT ONE FOR WHICH ONE OR BOTH VESSELS ARE RESPONSIBLE. *The defence of inevitable accident* CANNOT *be sustained unless it appears that both parties have endeavored, by all means in their power, to prevent the collision;* NOR CAN THE DEFENCE BE MAINTAINED WHERE A VESSEL VOLUNTARILY PUTS ITSELF IN A SITUATION WHERE IT RECEIVED THE EFFECT OF NATURAL FORCES, THE RESULTS OF WHICH SHOULD HAVE BEEN FORESEEN, AND MIGHT REASONABLY HAVE BEEN ANTICIPATED."

The same rule is laid down in these cases:

*Union S. S. Co.* v. *N. Y. & Va. S. S. Co.*, 24 *How'd*, 307.

*Sampson et al.* v. *U. S.*, 12 *Ct. Cls.* 480.

*The "Clarita" and the "Clara,"* 23 *Wall.* 1.

## IV.

THE COLLISIONS WERE THE RESULT OF NEGLIGENCE ON THE PART OF THE OFFICERS IN COMMAND OF THE UNITED STATES VESSELS.

It appearing that the "*Future City*" was without fault and that the United States ships anchored and remained in exposed and unlawful positions, the burden of proof is upon the latter to show a valid excuse for their conduct. (*Spencer on Marine Collisions*, § 125; *The "Scioto,"* 2 *Ware*, 360; *The "Great Republic,"* 23 *Wall.* 20; *The "Grace Girdler,"* 7 *Wall.* 196). The officers of the United States ships were in absolute command of them and were responsible for their management. (*Ayres* v. *Knox*, 7 *Massachusetts*, 316.) The anchorages occupied by the ships were selected by their officers without consulting anyone authorized or competent to give directions or advice about such matters. In the appellant's motion for new trial it was alleged that when the naval fleet was about to enter the mouth of the Mississippi, on their way to New Orleans, some of the ships took on board pilots, to conduct them up the river. As heretofore shown this motion is not properly before this court and should not have been included in the record. But if pilots were in fact employed, this would not excuse the naval officers. The navigation of the Mississippi, so far as pilot rules are concerned, is divided into two jurisdictions. The lower limits of the city of New Orleans mark the dividing line. Below, where the trade is foreign and conducted in sea-going vessels, the navigation is governed by pilot rules applicable to Atlantic and Pacific inland waters. Above, where the trade is almost wholly domestic and conducted in river craft of all kinds, the navigation is regulated by

pilot rules for western rivers. (*The "Albert Dumois,"* 177 *U. S.* 240, 244–248.) Pilots such as those, whose employment by the United States ships is alleged, are engaged in the navigation below New Orleans. They have nothing to do with that above. Neither had they any authority with regard to the anchoring of vessels in the harbor. The local laws (*supra*) gave them no such jurisdiction, but vested it exclusively in a board of harbor-masters. So far as the navigation of the harbor of New Orleans is concerned these laws took precedence over any general regulations applicable to the navigation of the Mississippi. The act of August 7, 1789 (*Sec.* 4235 *R. S. U. S.*), provides:

> "Until further provision is made by Congress, all pilots in the bays, inlets, rivers, *harbors and ports* of the United States shall continue to be regulated in conformity with the existing laws of the States, respectively, wherein such pilots may be, or with such laws as the States may respectively enact for the purpose."

Congress has always forborne to interfere with local customs and laws prevailing in ports and harbors of the country. It is provided by act of August 19, 1890 (26 *Stat. L.* 320), which is a code of regulations "to be followed by all public and private vessels of the United States upon the high seas and in all waters connected therewith, navigable by sea-going vessels":

> "ART. 30. * * * Nothing in these rules shall interfere with the operation of a special rule, duly made by local authority, relative to the navigation of any harbor, river, or inland water."

The officers in question were bound to know the law, and it was their duty to inquire about local usages and

regulations and conform to them. They had no reason to expect that the harbor-masters would seek out and enlighten the commander of every ship which came into port or to suppose that the commerce of the Mississippi would be suspended during their call at New Orleans.

## V.

THE CLAIMANT (APPELLEE) IS ENTITLED TO RECOVER THE FULL SUM AT WHICH ITS DAMAGE HAS BEEN FIXED.

The court below has fixed the amount of damages recoverable by the claimant, and it is not competent to dispute its finding on this appeal. The appellant, however, seeks to have eliminated the portion of the award made on account of the loss of barge "68." It is claimed that this should be done because of alleged inconsistencies between the findings and a statement made in the opinion. In the original findings the court found, that as the tow bore down upon the "*Galena*" after the collision with the "*Atlanta*," the "*Galena*," which was swinging at anchor, sheered in toward the New Orleans shore and collided with barge "68." In the present findings, this fact does not appear specifically. Counsel for the United States first suggest and then boldly assert and repeat the statement that the Court of Claims was convinced after hearing their second and third motions, that the United States vessels were not swinging at anchor. In reply we need only refer the court to findings XII (*p.* 10), and XXII (*p.* 14), where it is distinctly stated that the vessels were "*anchored on swinging chains*," and that by reason of their improper positions and "*of their swinging at anchor, they rendered the navigation of the river by tow-boats with tows, pursuing their usual and customary*

*course, hazardous and extremely dangerous.*" Hence the court's findings and opinion with regard to the second collision are perfectly consistent. But if the court had actually omitted all mention of the manner in which the war ships were anchored, the findings would still furnish ample support for the judgment. It is shown (*Finding XVI, pp.* 11, 12), that the "*Galena*" was even closer to the New Orleans shore than the "*Atlanta;*" that the collision with the "*Atlanta*" swung the rear end of the tow downstream, whereas it had been quartering upstream at an angle of 45°. If the "*Atlanta*" had not been where she was, it is possible that the "*Future City*" might have "staightened up" her tow before reaching the "*Galena*" and passed inside of her; but the "*Future City*" could not recover from the position into which the first collision threw her, and in addition "straighten up" her tow while, covering the interval of 400 feet, intervening, between the "*Atlanta*" and "*Galena.*" It is immaterial whether the "*Atlanta,*" "*Galena,*" and "*Richmond*" were all at fault, or whether the three collisions and the ensuing loss are all attributable to the improper anchorage of the "*Atlanta,*" and were the result of the first collision. In either case the responsibility falls upon the United States.

We submit that the judgment should be affirmed.

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